Berjaya Sompo Insurance Berhad v Nilai Porcelain Inn Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — RAYUAN SIVIL NO W-02(NCC)(W)-1553–07 OF 2012
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
5 SEPTEMBER 2014

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Insurance — Fire insurance — Repudiation of liability — Insurer repudiated liability on ground insured committed arson — Insured contended fire was caused by electrical short circuit — Whether evidence before trial court proved insurer's case beyond reasonable doubt — Whether evidence showed insured had motive and opportunity to commit arson — Whether trial judge's failure to properly evaluate evidence of the relevant witnesses resulted in perverse verdict

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The respondent had insured its stock-in-trade, office equipment, furniture and fittings and renovations at its business premises ('the premises') for RM365,000 under a fire insurance policy ('the policy') issued by the appellant. A fire at the premises during the validity period of the policy destroyed the insured goods. The respondent contended the fire was caused by an electrical short circuit and claimed payment of the insured sum but the appellant rejected the claim asserting that its investigations revealed the fire was deliberately caused by the respondent and/or its agents using kerosene. The respondent sued the appellant for payment of the insured sum in the High Court. The trial saw evidence being given by two loss adjusters (DW4 and DW5) and a specialist fire investigator (DW2) hired by the appellant, a chemist (DW3) who tested samples taken by DW2 from the fire-ravaged premises and a senior officer with the fire department (PW4) who had investigated the cause of the fire and appeared as witness for the respondent. The trial court allowed the respondent's claim and found that the respondent had proved its case on balance of probabilities whilst the appellant had failed to prove arson. In the instant appeal against the High Court's decision, the appellant contended that the trial judge erred in (a) regarding PW4 as an expert and preferring his evidence over DW2's even though the latter was eminently more qualified in the field of fire investigation than PW4 and (b) failing to properly evaluate the evidence given by DW4, DW5, DW3 and the respondent's director, PW1.

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Held, allowing the appeal and setting aside the decision of the High Court:

(1) A maximum evaluation of the evidence before the High Court showed the appellant had proved beyond reasonable doubt that the fire at the insured premises was deliberately started by the respondent through its

agent/agents. The evidence was not mere suspicion and showed there was motive and opportunity for the respondent to have caused the fire through its agent/agents (see paras 114–113).

(2) By PW4's own admission during cross-examination, he had only been a fire investigator for about a year during which time of the 20 cases he had investigated, only five were possibly from causes other than electrical. How could that make him an expert as found by the trial judge? In the light of his experience in investigating fires and how he determined the origin and cause of the fire in the instant case, his evidence that he was not able to smell or see kerosene at the affected areas should have been treated with great caution by the trial judge. DW2 and DW4, on the other hand, each had at least 15 years' experience in investigating fires and it was reasonable to accept their evidence that they were able to discern the smell of kerosene, or at least volatile hydrocarbon, in the insured premises. Their initial suspicion of the presence of kerosene was validated by DW3's test results. Yet their evidence was either disregarded or dismissed outright by the trial judge who chose to accept PW4's evidence instead (see paras 83 & 87–88).

(3) The trial judge failed to consider that DW2's evidence, from the time she collected the samples from the insured premises until she handed them over to DW3, was not discredited. Nor was there evidence of any break in the chain of evidence with regard to the samples. As DW3's method of analysis and conclusion was unchallenged, his findings of the presence of kerosene in nine out of the 15 samples handed to him by DW2 must stand and should not have been so readily dismissed by the trial judge. Her dismissal of DW3's evidence was a misdirection (see paras 79, 75 & 77).

[Bahasa Malaysia summary

Responden telah menginsuranskan barang perdagangan, perkakas pejabat, perabut dan kelengkapan dan pengubahsuaian di premis perniagaannya ('premis-premis') untuk sebanyak RM365,000 di bawah polisi insurans kebakaran ('polisi') yang dikeluarkan oleh perayu. Kebakaran di premis-premis semasa tempoh sah polisi telah memusnahkan barang-barang yang diinsuranskan. Responden berhujah kebakaran disebabkan oleh litar pintas elektrik dan menuntut bayaran jumlah yang diinsuranskan tetapi perayu menolak tuntutan tersebut dengan menegaskan bahawa penyiasatannya menunjukkan bahawa kebakaran adalah sengaja disebabkan oleh responden dan/atau ejen-ejennya dengan mengguna minyak tanah. Responden menyaman perayu untuk bayaran jumlah yang diinsuranskan di Mahkamah Tinggi. Perbicaraan melihat keterangan yang diberikan oleh kedua-dua adjuster kerugian (DW4 dan DW5) dan pakar penyiasat kebakaran (DW2) yang diupah oleh perayu, ahli kimia (DW3) yang menguji sampel-sampel yang diambil oleh DW2 daripada premis-premis yang dibinasakan oleh api dan

pegawai kanan jabatan bomba (PW4) yang telah menyiasat punca kebakaran dan menjadi saksi untuk responden. Mahkamah perbicaraan membenarkan tuntutan responden dan mendapati bahawa responden telah membuktikan kesnya atas imbangan kebarangkalian sementara perayu telah gagal untuk membuktikan perbuatan membakar. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu berhujah bahawa hakim perbicaraan tersilap dalam (a) berkaitan PW4 sebagai pakar dan lebih menyukai keterangannya daripada keterangan DW2 walaupun DW2 jelas lebih berkelayakan dalam bidang penyiasatan kebakaran daripada PW4 dan (b) gagal untuk menilai dengan betul keterangan yang diberikan oleh DW4, DW5, DW3 dan pengarah responden, PW1.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Penilaian maksima keterangan di hadapan Mahkamah Tinggi menunjukkan bahawa perayu membuktikan telah melampaui keraguan yang munasabah bahawa kebakaran di premis-premis yang diinsuranskan adalah dimulakan dengan sengaja oleh responden melalui ejen/ejen-ejennya. Keterangan bukan semata-mata disyaki dan menunjukkan terdapat motif dan peluang untuk responden untuk menyebabkan kebakaran melalui ejen/ejen-ejennya (lihat perenggan 114–113).

(2) Dengan pengakuan oleh PW4 sendiri semasa pemeriksaan balas, dia hanya menjadi penyiasat kebakaran selama satu tahun di mana daripada 20 kes yang telah disiasatnya, hanya lima berkemungkinan berlaku atas sebab selain daripada elektrik. Bagaimana ia boleh menjadikan dia sebagai pakar seperti yang didapati oleh hakim perbicaraan? Berdasarkan pengalamannya dalam menyiasat kebakaran dan bagaimana dia menentukan asal dan sebab kebakaran dalam kes ini, keterangannya bahawa dia tidak dapat menghidu atau melihat minyak tanah di kawasan yang terjejas patut dianggap dengan berhati-hati oleh hakim perbicaraan. DW2 dan DW4, sebaliknya, setiap seorang sekurang-kurangnya mempunyai 15 tahun pengalaman dalam menyiasat kebakaran dan ia adalah munasabah untuk menerima keterangan mereka bahawa mereka dapat menilai bau minyak tanah, atau sekurang-kurangnya hidrokarbon mudah meruap, di dalam premis-premis yang diinsuranskan tersebut. Keraguan permulaan mereka mengenai kehadiran minyak tanah disahkan oleh keputusan ujian DW3. Tetapi keterangan mereka tidak diendahkan atau ditolak terus oleh hakim perbicaraan yang menerima keterangan PW4 sebaliknya (lihat perenggan 83 & 87–88).

(3) Hakim perbicaraan gagal untuk mempertimbangkan bahawa keterangan DW2, dari masa dia mengumpulkan sampel-sampel daripada premis-premis yang diinsuranskan sehingga dia menyerahkannya kepada

DW3, tidak diragui. Tidak terdapat keterangan mengenai apa-apa pecahan dalam rantaian keterangan berkaitan sampel-samplel tersebut. Memandangkan cara analisa DW3 dan kesimpulan tidak dicabar, dapatannya mengenai wujudnya minyak tanah dalam sembilan daripada 15 sampel yang diserahkan kepadanya oleh DW2 mesti bertahan dan tidak patut dengan mudah ditolak oleh hakim perbicaraan. Penolakannya terhadap keterangan DW3 adalah salah arah (lihat perenggan 79, 75 & 77).]

Notes

For cases on repudiation of liability, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 171–175.

Cases referred to

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Appeal from: Suit No D-22NCC-2054 of 2010 (High Court, Kuala Lumpur)

Malik Imtiaz (Satharuban & Ranjini Anndy with him) (Satha & Co) for the appellant.

Sabriena Richards (T Susielan with her) (Hakeem Arabi & Associates) for the respondent.

Zaharah Ibrahim JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] The respondent (the plaintiff in the High Court) carried on business dealing in handicraft products, artificial flowers, souvenirs and wedding accessories at its place of business at Lots 30, 31 and 32, Jalan Nilai, Nilai 3/1, Nilai 3 Industrial Park, Nilai, Negeri Sembilan (the 'insured premises').

[2] The respondent's stock in trade, office equipment, furniture fittings and renovations (the 'insured goods') at the insured premises were covered by fire insurance under a fire insurance policy (the 'policy') issued by the appellant (the defendant in the High Court).

[3] In this judgment we will refer to the parties as they were in the High Court.

[4] To obtain the policy, a consideration of RM1,295.75 in annual premiums were paid by the plaintiff. The amount insured was RM365,000. The period of coverage was from 31 May 2006 until 30 May 2007, both dates inclusive.

[5] In the early morning of 8 February 2007, a fire broke out in the insured premises, destroying the insured goods and other goods belonging to the plaintiff. The plaintiff estimated its loss to be about RM424.000.

[6] The plaintiff then made a claim against the defendant for the total insured amount of RM365,000 but the claim was rejected by the defendant.

[7] The plaintiff claimed that the fire was caused by a short circuit in the electrical wiring at the premises. However, the defendant said that the fire was caused by the deliberate act of the plaintiff through its agents using kerosene placed at several places in the insured premises.

IN THE HIGH COURT

[8] The plaintiff therefore filed this suit before the High Court claiming the insured sum of RM365,000 with interest at the rate of 8%pa on the insured sum from the date the cause of action accrued (8 February 2007) until full and final settlement, and costs.

[9] During the trial in the High Court, five witnesses gave evidence for the plaintiff and five gave evidence for the defendant. Two of the witnesses were accepted by the learned High Court judge as expert witnesses. They were PW4 and DW2. The two expert witnesses, quite naturally, gave conflicting evidence each in favour of the party for whom he/she was called to give evidence.

[10] At the conclusion of the trial, the learned High Court judge concluded that PW4's evidence was the more reasonable and reliable compared to that of DW2. On the balance of probabilities, Her Ladyship found that the plaintiff had proved its case.

[11] The learned High Court judge also found that the defendant had failed to prove beyond reasonable doubt that the fire was deliberately started by the plaintiff.

[12] Consequently, the learned High Court judge allowed the plaintiffs claim against the defendant.

[13] The defendant appealed to this court against that decision of the High Court.

IN THE COURT OF APPEAL

[14] Before the Court of Appeal, the main grounds of the appeal as set out in the memorandum of appeal relate to:

(a) the acceptance of by the learned High Court judge of PW4 as an expert and the acceptance of his evidence and rejection of the evidence of DW2;

(b) the failure of the learned High Court judge to properly evaluate the evidence of PW1;

(c) the failure of the learned High Court judge to properly evaluate the evidence of DW3 and his chemical analysis report; and

(d) the failure of the learned High Court judge to deal with the evidence of DW4 and DW5.

ISSUES

[15] The fact that the fire occurred on 8 February 2007 is not in dispute. The defendant claims that the fire was deliberately started and therefore the claim made by the plaintiff falls within the exception set out in cl 15 of the policy which deals with false and fraudulent claims.

[16] The sole issue therefore is whether the fire was deliberately started by the plaintiff or any person acting in its behalf such as to enable the defendant to rely on cl 15 of the policy to reject the plaintiff's claim.

BURDEN OF PROOF

[17] It is trite that the burden to prove that the claim is false or fraudulent and therefore falls within an exception in the policy lies on the insurer who must discharge that burden beyond reasonable doubt. This has been made clear in several cases, in particular the Federal Court decision in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301.

[18] It was therefore incumbent upon the defendant to prove, beyond reasonable doubt, that the claim by the plaintiff was false or fraudulent in that the fire was in fact deliberately started by the plaintiff or any person acting in its behalf.

THE EVIDENCE ADDUCED BY THE DEFENDANT

[19] The defendant engaged McLaren Saksama (Malaysia) Sdn Bhd ('McLaren') (part of McLarens Young International Global Claims Services) to investigate the fire. A loss adjuster from McLaren, Mr David Selvanesan Navaratnam (DW4) went to the insured premises in the afternoon of 8 February 2007, the same day of the incident.

[20] DW4 prepared two reports:

(a) Preliminary Loss Advice Commercial-Fire (dated 8 February 2007) (D34); and

(b) First Report Commercial-Fire (dated 21 April 2007) (D35).

[21] DW4 resigned from McLaren and the investigation into the fire at the plaintiff's premises was taken over by Mr Michael Yong Chuan Tong (DW5) in June 2007. DW5 prepared a report known as the Second and Final Report Commercial Fire (dated 30 June 2007) (D36).

[22] According DW4, his main observations/findings when he was at the insured premises 'towards early afternoon' on 8 February 2007 were:

(a) there were multiple seats of fire at the insured premises;

(b) there was an odour of accelerants at the rear of the insured premises particularly at the left, centre and right sections; the closest smell he could identify that with was the smell of kerosene;

(c) the pattern of burning was not consistent with a normal spread of fire.

[23] DW4 said he was not comfortable with what he saw. He said what he smelt was not consistent with burnt debris. He did not consider the cause to be electrical. From his initial survey he found sufficient reason to 'bring the experts'.

[24] McLaren then, on the same day, with the agreement of the defendant, engaged Forensic Services (M) Sdn Bhd to conduct further investigations into the fire. The investigator from Forensic Services (M) Sdn Bhd, Ms Aini Ling Juh Chin (DW2) commenced her investigations at the insured premises on the very next morning, on 9 February 2007. She was also there on the next day, 10 February 2007.

[25] DW2 sent samples taken by her from the insured premises to consulting chemist Mr Cheong Kok Sum (DW3) in 14 sample bags on 12 February 2007 and another on 13 February 2007.

[26] DW2 gave evidence that she found widespread and severe low-level burning at the burnt areas, consistent with fire started at multiple locations. Further investigation (with the aid of the laboratory results from tests conducted by DW3 on samples collected at the relevant locations) show that kerosene was detected in five of the samples collected at the severely burnt areas and four in the *unburnt parts* of the premises. In other words, nine of the samples collected by DW2 and tested by DW3 were found to contain traces of kerosene.

[27] The forensic report prepared by DW2 for Forensic Services (M) Sdn Bhd (D31) shows that she had considered the possibility of the fire having been caused by a flashover resulting from a short-circuit of the wires connected to the fluorescent lights kept switched on at the rear of the premises after business hours. However, DW2 said this could not explain the presence of kerosene at various locations and the widespread low-level burning which was observed in the affected area.

[28] The report also states that:

> The overall pattern and severity of the fire damage observed at the premises was uncharacteristic of natural spread *from a single seat of fire* and/or the result of the fire fighting efforts by the firemen after more than an hour following discovery. (Emphasis added.)

[29] DW2 gave evidence that air is a poor conductor of heat, and since the place was closed up, there was no inward rush of air from outside to enable the fire to spread by means of convection. In such situation fire would only spread in the presence of other conductors and by way of direct contact. Steel being a good conductor, the steel racks could conduct with a combustible, but this, according to DW2, would be 'the slowest mechanism of fire spread'.

[30] According to the forensic report D31, and DW2's oral evidence, the smell of volatile hydrocarbon was noted when the fallen debris in the affected area in Lot 30 was cleared systematically, 'layer by layer until the original objects is (sic) revealed'.

[31] DW2 was extensively cross-examined on her findings/observations, especially in relation to the findings by PW4 that the fire was caused by some short-circuited electrical installations. She remained steadfast in her opinion that the fire was deliberately started

[32] DW2 gave evidence that the fire could not have been caused by a flashover from a short circuit as there would have been a clear demarcation of

where the areas were burnt and areas that were not, that should be in the form of a 'V' or a 'U'. DW2 could not find that tell-tale 'V' or 'U'.

[33] In relation to the handing over of the 15 samples to DW3, DW2 gave evidence that she only handed them over to DW3 on Monday, having collected them on Friday. She explained that she did not want to have to brave the Friday traffic to deliver them to DW3, and DW3 did not work on Saturday (and Sunday). The samples, which were collected and placed in 'arson bags' at the insured premises were kept in her work bag and kept in her custody at home. DW2 explained that 'arson bags' are plastic bags 'specially made to hold fire debris that will help avoid non contamination or the loss of trace quantities of volatile hydrocarbon'.

[34] DW3 conducted laboratory tests on the 15 samples with volatile hydrocarbon collected by DW2 at the scene of the fire. He followed the extraction method based on the American Society of Testing and Materials (ASTM) standard E1412 and analysed the sample using ASTM standard E1387. According to DW3 both standards are recognised in Malaysia. DW3 concluded that nine of the samples show the presence of petroleum hydrocarbon fractions consistent with evaporated kerosene. Cross-examination of DW3 did not raise any doubt that kerosene traces were found in those samples.

[35] DW5 gave evidence that the conclusion reached from the financial analysis carried out in respect of the plaintiff was that the plaintiff was facing cash depletion due to reduced stock turnover and decreasing sales. He was of the view that the plaintiff 'welcomed' the fire.

THE EVIDENCE ADDUCED BY THE PLAINTIFF

[36] In relation to the cause of the fire, the plaintiff relied principally on the Fire Department's Fire Investigation Report prepared by the investigation team lead by En Faizal bin Ahmad (PW4), a senior fire officer who was directed to investigate the cause of the fire ('PW4's Report'), and the evidence of PW4 was given through his oral evidence.

[37] PW4, in his examination-in-chief, stated that he went to the insured premises about 4.45 pm 'pada hari yang sama'. This was on 8 February 2007, according to PW4's report. He took over from En Ghazali bin Maulud (PW3), a fire officer who had by then installed the yellow rope barricade at the premises.

[38] From his investigation, PW4 was of the opinion that the fire was caused by a short circuit in the wires connected to the fluorescent lamp at the rear portion of the premises. His opinion is based on what he observed to be:

(a) a 'V'-shape discolouration (marked with a 'U'-shape marking on *Gambar 3* in PW4's report);

(b) signs of oxidation of the steel racks (marked with a red arrow in *Gambar 4* in PW4's report); and

(c) the breaking/cracking of cement render ('spalling') (marked with red arrows on *Gambar 5* and *Gambar 6* in PW4's report).

[39] PW4 deduced that there must have been a short circuit in the wiring because he observed that wires were not connected using proper connectors. He found wires which he said had 'metal marks'. These are wires whose metal parts had melted due to explosion or sparking, which he said is due to the wires touching each other. However, PW4 admitted he did *not* take a sample of such wires and have it sent to any laboratory.

[40] When cross-examined, PW4 was asked if he had considered that the short circuit was caused by the fire starting from the *lower level*. PW4's answer was it could not be because 'semasa siasatan dijalankan saya memeriksa keseluruhan wayar letrik cair dan dapati banyak penyambung wayar tidak gunakan connecter dan ini boleh menyebabkan mudahnya berlaku litar pintas'.

[41] When shown photographs of the affected areas, PW4 admitted that the more severely burnt areas were at the floor level.

[42] PW4 denied that kerosene was detected at the premises as he stated that there was no kerosene smell. PW3 also said that he did not smell kerosene. PW4 further said that if there was kerosene it would create a rainbow-like effect on the surface of the water which remained after the fire fighting efforts ended.

[43] PW3 in his witness statement said that the affected areas were the rear portion of Lots 31 and 32. He opined that the cause of the fire was electrical in origin as he said he did not find flammable liquids or gas, cigarette butts or multiple seats of fire. He also said that there were no signs of kerosene nor any smell of kerosene.

[44] However, PW3 admitted that he was not a fire investigator. He had no experience in investigating fires. His expertise was in fire fighting.

[45] PW1 was a director of the plaintiff. According to him, he became a director of the plaintiff in 2006. The plaintiff was operating at different premises, originally. It moved to the insured premises at Lots 30, 31 and 32 when the landlord of the original premises did not want to extend the tenancy. This is borne out by the tenancy agreement dated 12 September 2006 (in bundle A in the High Court). The monthly rent for all three lots was RM 5,000. According to PW1, there was a change of directors at that time. As a result, the plaintiffs accounts for 2005 and 2006 were not yet audited. They were about to submit the accounts for auditing when the fire broke out on 8 February 2007.

[46] PW1 denied that the plaintiff was cash-strapped. He was shown the plaintiff's bank statements. The statements showed that the opening balance of the plaintiff's two bank accounts had reduced by more than RM100,000 in January 2007 as compared to that in January 2006. The opening balance for January 2007 was RM 12,942. Its main account in Public Bank showed a balance of RM 11,091.56 as at 1 January 2007.

[47] According to PW1, the keys to Lots 30 and 32 were kept in the cashier's drawer. The keys to Lot 31 were kept by PW1 as well as by his accounts clerk, Chan Wei Kin. Each morning either he or Chan Wei Kin would open the door to Lot 31.

[48] PW1 gave evidence, when he was recalled for further examination, that on the morning of 8 February 2007, as was his routine, he would go to Chan Wei Kin's staff hostel and from there 'menumpang Ms Chan' to go to work. While waiting for her, he would be watching television.

[49] PW1 said he would normally arrive at the insured premises about 9.25 or 9.30am. It was when he was waiting for Chan Wei Kin at the hostel on 8 February 2007 that he was informed by his workers of the fire.

[50] Chan Wei Kin was not called to give evidence. PW1 said he had made attempts to contact her but failed.

[51] PW4's report includes statements given by PW1 in the course of the PW4's investigations into the fire. PW1 stated that he was at Blok A, Tingkat 1, No Pintu 11, Jalan Mekanikal, Perindustrian Nilai 3, Nilai. His normal address was at Sri Pelangi Apartment Jalan Genting Klang, Kuala Lumpur.

[52] PW2 with whom PW1 had a relationship at the material time before they married subsequently, gave evidence that PW1 arrived at her house in Cheras at 8.15pm on 7 February 2007 and only left to go to work the next morning (8 February 2007).

[53] According to PW2, the plaintiff's premises were about 30km from her house. The journey would take about 45 minutes.

SUPPLEMENTARY EVIDENCE OF DW2

[54] DW2's supplementary witness statement is by way of rebuttal evidence in relation to the PW4's report.

[55] In her supplementary witness statement DW2 had explained why she disagreed with PW4's conclusion that the fire was caused by short circuit. She was shown the PW4's report, and in particular the photographs in PW4's report and his findings of a 'V shape pattern and oxidation. Her evidence (in answer to question five) was as follows:

> Paragraph 6.2 is indicated to present the evidence indicative of fire origin.
>
> In paragraph 6.2.1 Fire evidence - the 'fire sign' is not described. It simply stated that the origin was identified to be from electrical wiring for the fluorescent light. The red arrow in Gambar 1 was pointing to the steel support frame for the suspended false ceiling. Electrical wiring that is not in a conduit (that may cause a short circuit) is not an indication or evidence of fire origin (or 'fire sign' indicating the fire origin. As for Gambar 2,1 know that the switches were located at the front of the premises where it is affected by heat and smoke. Neither Gambar 1 nor Gambar 2 describe 'fire sign' indicating the fire origin. I cannot see a 'V shape in Gambar 3. The pattern on the surface of the shutters and concrete column is not consistent with a V-pattern of burning (refer NFPA 921) created by flames, heat from hot gases and smoke within the fire plume. I agree that the 'discoloration' indicates intense heat in the area. Such 'discoloration' was also observed in a number of other places in the burnt area of the premises. The 'oxidation 'in the area shown in Gambar 4 is common to many fire scenes. Similar extent of burning was observed in other parts of the burnt area of the premises.

[56] In regard to this evidence of DW2, the only question put to her in cross-examination was 'I put it to you it is V-shaped'. to which DW2 disagreed. Similar evidence was given in her answers to Questions 7 and 8.

[57] On PW4's finding of 'spalling'. DW2's evidence, in answer to question 11, was 'Spalling of concrete render is commonly observed in fire scenes'. She was not cross-examined on this.

[58] DW2's opinion was asked of the PW4 report which states 'tidak menjumpai kesan minyak tanah atau petrol'. DW2's response was as follows:

> The smell of kerosene or petrol (usually trace amount after a fire) could easily be overwhelmed by the smoke and gases remaining in the premises after a fire, especially when the doors/shutters were closed after the extinguishment. Detection of trace amount of kerosene or petrol after a fire could only be reliably done by

> systematic clearing/excavation of debris, and laboratory analysis of samples of debris collected. One or more trained, certified and dedicated canine will also be able to assist a fire investigator in detecting the presence of trace amount of kerosene or petrol.

[59] DW2 was not cross-examined on this.

[60] DW2 was asked to comment on that part of the PW4's report which states that if there was kerosene it would be floating on the water used to extinguish the fire. DW2's reply was as follows:

> The firefighting water would have drained after extinguishment. There were no pools of water inside the premises on which kerosene would have been found floating. IN the fire, the ceiling sheets (fibre-reinforced plaster boards) had fallen onto the floor, covering and absorbing residue kerosene on the floor. Hence, there would not be any obvious oily stains (of kerosene).

[61] On cross-examination, DW2 was asked only three questions on this point:

Q: 30 hours after the fire started?

A: Yes more than 24 hours after the fire started.

Q: You cannot be certain when the water would be drained away?

A: Yes.

Q: You cannot confirm what the investigator observed?

A: No.

ANALYSIS OF EVIDENCE

What was the cause of the fire?

[62] The learned High Court judge had clearly decided to approach the case on the basis of whose evidence was to be chosen: PW4's or DW2's.

[63] Her Ladyship chose to accept PW4's evidence on the basis, among others, that PW4's 'team of investigators were at the scene of the fire immediately upon notification on the same day of the fire' but DW2 was not.

DW4's evidence not considered

[64] Her Ladyship failed to consider the evidence adduced before the High Court that DW4 had arrived at the insured premises in the early part of the afternoon of 8 February 2007. He must therefore have been there even *before* PW4 arrived at 4.45pm.

[65] Not a single word was mentioned in the learned High Court judge's judgment about DW4's evidence.

[66] DW4 was without a doubt an experienced fire claims adjuster. DW4 had investigated some 300–400 fire claims in his 15–16 years of work as an adjuster. Of those, 40–50 claims involved arson.

[67] It was his findings during his initial survey of the insured premises as we have set out above that led to DW2 later being called in to investigate.

Dismissal of DW2's evidence

[68] DW2 is certified as a fire investigator by the International Association of Arson Investigators. She had testified as an expert witness in various courts in Malaysia and the Philippines and her evidence had been accepted by the courts. Her evidence on her qualifications as an experienced forensic expert was not challenged. DW2's credentials were in fact described by the learned High Court judge as 'quite impressive'.

[69] However, the learned High Court judge dismissed DW2's evidence because Her Ladyship found that DW2 did not conduct her investigation on the day of the fire and kept the samples for a couple of days and did not examine the electrical wiring.

[70] We find it rather unfortunate that DW2's evidence was dismissed in a rather summary manner despite her obvious expertise without that evidence being properly considered. In fact, Her Ladyship completely disregarded the rebuttal evidence of DW2 on PW4's report.

[71] There was no evidence nor suggestion that DW2's evidence was concocted or was in any way false.

[72] DW2 had meticulously examined the debris in the premises, lifting the debris layer by layer in order to reach the original floor. She had taken 15 samples from areas where her trained senses had smelt volatile hydrocarbon suspected to be kerosene.

[73] DW2 was well cross-examined on her admission that she took the samples with her on Friday and only handed 13 of them over to DW3 on Monday and a further two on Tuesday. However, at the end of the cross-examination there was no suggestion that there was any tampering of the samples or that there was any break in the chain of evidence. There was therefore no doubt as to the integrity of the 15 samples handed over to DW3.

[74] The learned High Court judge had also failed to consider the evidence of DW2 that of the nine samples found by DW3 to contain traces of kerosene, *four were in fact found in locations which were not affected by the fire.* These locations are better seen in Figure 3 in the forensic report. Her Ladyship failed to appreciate the significance of this evidence. This evidence would negate the possibility that the kerosene traces in the samples were the result of the burning of petrochemical-based materials in the insured premises. In any case, it was the unchallenged evidence of DW2 that kerosene has a different 'chemical signature' from 'Pyrolysis products of plastics'.

Dismissal of DW3's evidence

[75] DW3 was extensively cross-examined on the procedure he followed in his analysis of the 15 samples. However, a close scrutiny of the cross-examination shows that at no point in time was DW3's conclusions as to the kerosene traces found in nine out of the 15 samples challenged.

[76] The learned High Court judge dismissed DW3's findings on the following grounds:

(a) DW3 did not give evidence whether the fire was caused by the kerosene present in the samples;

(b) DW3 admitted that the tests he carried out did not show whether the alleged kerosene detected in the samples was involved in the fire; and

(c) DW3's tests merely detected the presence of kerosene but not the quantity,

[77] In our view the dismissal of DW3's evidence was a misdirection by the learned High Court judge.

[78] DW3 was merely the chemist who ran the tests on the samples provided by DW2. DW3 was not the investigator at the scene of the fire. His task was to determine if the samples contained kerosene. He would of course not be able to determine if the fire was caused by the kerosene present in the samples or

whether the kerosene was involved in the fire. As the samples contained only traces of kerosene, it stands to reason that DW3 would not able to provide the quantity of the kerosene.

[79] The learned High Court judge failed to consider that DW2's evidence from the time she collected the samples until she handed them over to DW3 was not discredited. Nor was there evidence of any break in the chain of evidence with regard to the samples. As DW3's method of analysis was unchallenged, his findings of the presence of kerosene in nine of the 15 samples handed over to him by DW2 must stand and should not have been so readily dismissed by the learned High Court judge.

Whosesale acceptance of PW4's evidence

[80] The learned High Court judge found that PW4 had conducted the investigation objectively, diligently and thoroughly.

[81] In deciding to accept PW4 as the expert whose evidence is to be accepted over that of DW2, the learned High Court judge stated in her judgment that even though 'PW4 may have only seven years experience I am satisfied that he possesses the necessary skills'.

[82] The learned High Court judge has obviously mistaken PW4's seven years of service in the Fire Department as experience in fire investigation.

[83] By PW4's own admission during cross-examination it is quite clear that prior to February 2007, PW4 had only served as a fire investigator 'Lebih kurang satu tahun lebih'. In that period of time he had only conducted fire investigations 'Lebih kurang 20 kali'. of which only 15 had electrical causes and only three were deliberately caused. In other words, of the 20 cases investigated by PW4, only five cases were possibly from causes other than electrical. How does this make PW4 an expert as found by the learned High Court judge?

[84] In her supplementary witness statement and during her oral evidence, DW2 had explained why she disagreed with PW4's conclusion that the fire was caused by short circuit. We have set out that evidence above.

[85] PW4 had quite obviously concluded that the fire was caused by electrical short circuit because of the fact that the wires at the fluorescent lights were connected without using proper connectors, and due to his findings of the 'V'-shaped discolouration and the oxidation and spalling in the area.

[86] We find it interesting that PW4 in his evidence testified that his team did excavation of the fallen debris using a small scoop and was just turning over papers to look for the metal mark. They found the metal mark. And there ended the investigation with the conclusion that the fire must have been caused by electrical short circuit.

[87] Quite obviously, PW4 and his team had decided that they had found the cause of the fire and as a result did not investigate the possibility of the fire being deliberately started. In the light of PW4's evidence on his experience in investigating fires, and how he determined the origin and cause of the fire, his evidence that he was not able to smell or see kerosene at the affected areas should have been treated with great caution by the learned High Court judge.

[88] DW2 and DW4 had each at least 15 years' experience in investigations of this nature and it is reasonable to accept their evidence that they were able to discern the smell of kerosene, or at least volatile hydrocarbon, in the insured premises. Their initial suspicion of the presence of kerosene was validated by DW3's test results. Yet their evidence was either disregarded or dismissed outright by the learned High Court judge who chose to accept PW4's evidence instead.

Finding

[89] Based on our scrutiny of the evidence of PW4, PW3, DW2, DW3 and DW4 and the forensic report and PW4's report, we are of the considered view that had the learned High Court judge properly evaluated all the evidence adduced by the defence and the plaintiff, Her Ladyship would have found that the defence had proved beyond reasonable doubt that the fire was deliberately caused by the placement of kerosene or kerosene based materials at the premises.

Who caused the fire?

[90] The learned High Court judge found that the defendant had failed to adduce any evidence of any deliberate act by the plaintiff to start the fire.

[91] We need to point out that the deliberate act of starting a fire in arson cases can be proved by circumstantial evidence. The Federal Court in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* found in that case that the chain of circumstantial evidence was insufficient to prove arson, but did not hold that arson cannot be proved by circumstantial evidence,

Motive

[92] The learned High Court judge dismissed the contention that the plaintiff had deliberately caused the fire as it was in dire financial straits. Her Ladyship accepted PW1's evidence that there was income from the business and that the plaintiff was able to settle most of the invoices.

[93] The learned High Court judge did not consider the admission by PW1 that barely a month before the fire, the plaintiff had merely RM 12,942 in its two bank accounts.

[94] PW1 claimed (with receipts adduced in evidence) that the plaintiff was able to pay off the invoices after the incident of the fire. PW1 however did not explain how the money was sourced. A close scrutiny of the plaintiff's bank accounts show that there were several payments into the Public Bank account by way of cash and house cheques, but the monthly balance until the end of 2008 barely touched RM10,000.

[95] What was obvious was that RM 12,942 would be barely sufficient to pay two months' rental of the premises (of RM 5,000 per month as shown by the tenancy agreement), let alone cover the operating and other expenses of the plaintiff.

[96] The learned trial judge did not consider at all the second and final report by McLaren (D36) prepared by DW5.

[97] Had Her Ladyship done so, she would have noted that for the financial year ending 30 June 2004, the plaintiff had 20 staff members and the staff costs were RM381,663. Even if the number of staff members had been halved by the date of the fire, the plaintiff clearly did not have the funds to meet the staff costs.

[98] D36 shows that that the plaintiff's stock purchases in 2005 and 2006 had reduced drastically since 2004. This, according to the report reflects a reduction in sales. PW1 claimed that the empty racks seen in the premises were due to his instructions to his staff to clear them to make way for new stocks. But this admission of empty racks would be consistent with reduced stock replenishment, reflecting reduced demand.

Opportunity

[99] PW1's evidence was that he and Chan Wei Kin had the keys to Lot 31. One or the other of them would open the door to Lot 31. Then the keys to Lot

30 and 32 which were kept in the cashier's drawer would be retrieved and the workers would then open the doors to Lots 30 and 32.

[100] The learned High Court judge's finding that 'All keys are kept in the drawer near the cash register and all workers have access to the keys' is clearly not supported by the evidence before the court.

[101] The evidence means that the workers knew they had to wait for either PW1 or Chan Wei Kin to open the door to Lot 31 before they could enter any of the 3 Lots.

[102] PW1's evidence that he left the premises at 7.30pm on 7 February 2007 and was at his girlfriend's house (PW2's house) by 8.15pm and left the house the next day morning, was touched upon by the learned High Court judge.

[103] However the learned High Court judge failed to deal with the evidence of PW1 that from PW2's house he went to Chan Wei Kin's hostel at Blok A, Tingkat 1, No Pintu 11, Jalan Mekanikal, Perindustrian Nilai 3, Nilai.

[104] PW1, when he was recalled to the witness stand, said that he was at Chan Wei Kin's hostel watching television while waiting for her to go to the insured premises when he was informed by his workers about the fire. But we note that in his witness statement (in answer to question 16), PW1 stated that it was when he was on the way to work at the insured premises that his workers called him on the telephone to tell him about the fire. He said at that time he had just arrived at Nilai.

[105] In answer to question 17 as to what he did on getting that information, he said 'Saya terus pergi ke premis tersebut'. The question is, did he or did he not wait for Chan Wei Kin at her hostel?

[106] PW1 initially said the worker who called to tell him about the fire was known as Jul. 'Dia tinggal kat asrama'. But in his statement in FIR 3C, he said the worker who informed him was 'Liya'. and the call came at 9.30am and he went straight to the insured premises.

[107] PW1 then explained that Lia called him first, then Jul. He tried to explain the confusion by stating that 'Sebab Lia dengan Jul adalah pekerja yang paling banyak bantu. Jul banyak tolong sebab tu saya ingat dia dulu'.

[108] We find this rather perplexing. If this worker (Jul/Lia) stayed at the hostel, it must be the same hostel that Chan Wei Kin was staying at as PW1's evidence was that the plaintiff had a staff hostel at that same address he gave

where he was waiting for Chan Wei Kin. Jul/Lia must know that Chan Wei Kin and PW1 would be arriving together at the premises as was their daily routine. Jul/Lia must know that the premises would not be able to be opened unless PW1 and Chan Wei Kin arrived. Why then did Jul/Lia go the insured premises to only then discover the fire and call PW1 at 9.05am?

[109] We note that when PW1 was cross-examined in relation to this aspect of his evidence he said '*Masa kebakaran pekerja saya ada di kedai. Mereka tahu nombor talifon (sic) saya. Cuma Jul call saya*'.(Emphasis added.)

[110] In other words, the plaintiff's workers were at the insured premises long before the alleged phone call to PW1. This would be expected as their hostel was in Nilai 3, the fire was discovered around 2.30am and by 3.35am (according to the Fire Department's log) at least two fire trucks were at the scene from Nilai and Seremban together with other Fire Department vehicles. There must have been quite a commotion in that locality.

[111] If the workers were at the insured premises during the fire or at least while the fire-fighting was going on, and they lived in the same hostel as Chan Wei Kin, and they all had PW1's telephone number, it is inconceivable that PW1 (a director of the plaintiff and who clearly was the person in charge of the plaintiff's operations) was only told of the fire or only knew of the fire at the earliest at 9.05am when Jul/Lia called him.

[112] The obvious conclusion is that PW1 or Chai Wei Kin either alone or jointly, possibly with the assistance of Jul/Lia, must have been the agent/agents causing the fire. Hence the rather clumsy attempts to explain when and how PW1 came to know of the fire.

Finding

[113] In our considered view, the evidence before the High Court showed that there was indeed motive and opportunity for the deliberate starting of the fire at the premises by the plaintiff through its agent/agents.

CONCLUSION

[114] In our view, a maximum evaluation of the evidence before the High Court shows that the defendant had indeed proved beyond reasonable doubt that the fire at the insured premises was deliberately started by the plaintiff through its agent/agents. The evidence before the court was not mere suspicion.

DECISION

[115] We are very mindful of the extent of appellate intervention when the trial court had made findings of facts. In this case however, as we have discussed above, we are of the view that appellate intervention is required.

[116] We therefore allow the appeal, and set aside the order of the High Court. We fixed costs at RM60,000 here and below and order that the deposit be refunded.

Appeal allowed and decision of the High Court set aside.

Reported by Ashok Kumar